

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRADLEY S. BLAKER

Claimant

V.

MIDWAY SALES & DISTRIBUTING, INC.

Respondent

AND

CHARTER OAK FIRE INSURANCE CO.

Insurance Carrier

Docket No. 1,077,640

ORDER

Claimant requests review of the September 14, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

John J. Bryan, of Topeka, Kansas, appeared for the claimant. Ronald A. Prichard, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from September 13, 2016, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ denied claimant's request for psychological treatment determining that, although claimant has a serious traumatic injury to his left leg, claimant has failed to prove he has a condition related to his work accident that should be treated by a mental health professional.

Claimant appeals, arguing that with the severity of his injury, multiple surgeries and ongoing physical symptoms and scars, psychological symptoms should be anticipated. Claimant contends that the current legal climate in Kansas dissuades doctors from seeking information about symptoms not clearly related to the injury for which treatment has been

authorized. Therefore, injured employees do not report certain symptoms, as is the case with claimant. Claimant contends the ALJ's Order should be reversed and authorization given to seek treatment from a psychiatrist or psychologist of his choosing.

Respondent contends claimant had ample time following the injury, and prior to the preliminary hearing, to obtain a medical report indicating that psychological care was necessary due to the work injury, but chose not to. Therefore, respondent argues the ALJ's Order should be affirmed.

The issue on appeal is:

Has claimant carried his burden of proving he has a condition related to the work accident which requires treatment by a mental health professional?

FINDINGS OF FACT

Claimant worked for respondent as a truck driver. On April 25, 2015, claimant was throwing scraps over a trailer when his supervisor backed over him with a 10,000 pound forklift. The force pushed claimant down and the forklift ran over his left leg. Claimant was taken by ambulance to the Stormont Vail Hospital where surgery was performed by Brett Wallace, M.D., to repair an open fracture of the left tibia. Claimant had a rod and screws placed in his leg. On April 29, 2015, claimant was transferred to KU Medical Center where he received a skin graft and an artery from his right arm was removed and placed in his leg, due to restricted blood flow in his leg. Claimant's right arm was not injured in the accident, but since the artery was removed he has developed ongoing issues.

Claimant was allowed to return to work on August 10, but had problems with his right hand, including numbness, loss of strength and pain and loss of range of motion in his left leg and ankle. Claimant testified the pain in his leg gets worse with changes in the weather and he can't walk as fast as he used to.

Claimant also testified to having flashbacks about the accident. These happen once a week and claimant wakes up in the middle of the night thinking about the accident. He gets nervous and jumpy around anything big and yellow, and feels uneasy about the idea of operating a forklift. Claimant testified this has been happening for six to eight months, but he did not report these flashbacks or night awakenings to any of his treating or examining doctors.

Claimant has not had an evaluation from any mental health professional either before or after the injury. Claimant contends he is more withdrawn and his temper is shorter since the accident. He feels he would benefit from psychological care and treatment. Claimant admits he has been taking Zoloft for the last four or five years for depression, as prescribed by his primary care physician.

Claimant received treatment at Stormont Vail Hospital and KU Medical Center. The April 24, 2015, records from Stormont Vail mention psychiatric findings, as claimant having a normal mood and affect. Claimant went to KU Medical Center on May 13, 2015, and June 26, 2015, during which time he remained off work. By July 24, 2015, he had returned to work with restrictions and undergone a two week work hardening period. There is no mention of post-traumatic stress disorder (PTSD) or a request for a psychological evaluation or treatment in any medical records.

Claimant was evaluated by orthopedic surgeon E. Bruce Toby, M.D. on October 9, 2015, at which time he was determined to be at maximum medical improvement (MMI). Claimant was listed as needing no further treatment. There is no mention of a request for psychiatric treatment or evaluation.

Claimant was referred by respondent to orthopedic surgeon John H. Gilbert, M.D., for an evaluation on April 20, 2016. X-ray films from April 4, 2016, indicated claimant's left leg fracture had healed, with a good result. Claimant remained at MMI and an impairment rating was provided pursuant to the *AMA Guides*, 6th ed. No further treatment was recommended by Dr. Gilbert. There is no mention of a request for a psychiatric evaluation or treatment.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(j) states:

(j) "Health care provider" means any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, audiology or psychology.

K.S.A. 2014 Supp 44-510h(a)(b)(2) states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing,

medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b) . . .

(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

In Kansas, traumatic neurosis following a physical injury and shown to be directly traceable to that injury, is compensable under the Kansas Workers Compensation Act (Act).¹

However, as noted above, it is claimant's burden to prove his or her right to the benefits claimed under the Act. To establish a compensable claim for traumatic neurosis, claimant must show: (1) a work-related physical injury; (2) symptoms of the traumatic neurosis; and (3) that the neurosis is directly traceable to the physical injury.²

In this record, there is insufficient evidence that claimant is suffering from a traumatic neurosis. Also, as noted by the ALJ, none of claimant's medical providers have recommended a psychological evaluation or treatment as a result of this accident. The only mention of claimant's psychological mood is contained in the Stormont Vail records from April 24, 2015, which indicate a normal mood and affect.

The Act allows an injured claimant \$500.00 in unauthorized medical expense to seek a health care provider evaluation, including an opinion in the field of psychology. No such evaluation has been sought by claimant in this matter. Claimant has failed to prove a work-related need for a psychological evaluation. The denial of claimant's request for a psychological evaluation or treatment is affirmed.

¹ *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973).

² *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to show a need for a psychological evaluation or treatment stemming from his work-related accident with respondent on April 24, 2015.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated September 14, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge

³ K.S.A. 2015 Supp. 44-534a.